KUMPULAN TEKNIK SDN BHD A

v.

MURAD HASHIM COMMUNICATION SDN BHD & ANOR

HIGH COURT MALAYA, IPOH B
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: 22-174-2006]
16 FEBRUARY 2012

CONTRACT: *Assignment - Intention of parties - Claim for damages for work done - Whether parties consented and agreed to assignment under contract - Whether parties' intention was to assign project to plaintiff - Whether second defendant failed to honour assignment to plaintiff - Whether second defendant obliged under s. 71 Contracts Act 1950 or on basis of quantum meruit to pay plaintiff all monies due for work done* C D

CONTRACT: *Breach - Joint venture agreement - Claim for deposit paid by plaintiff under agreement - Whether first defendant failed to comply with obligations and undertaking - Terms of agreement - Whether deposit non-refundable* E

CONTRACT: *Quantum meruit - Joint venture - Claim for damages for work done - Plaintiff to submit invoices and obtain payment directly from second defendant - Whether claim based on quantum meruit can be made for work done where contract terminated by breach - Whether there was unjust enrichment - Whether second defendant obliged under s. 71 Contracts Act 1950 or on basis of quantum meruit to pay plaintiff all monies due for work done* F

The second defendant ('D2') was the main contractor to DIGI G
Telecommunications Sdn. Bhd. ('DIGI') by virtue of a Frame Contract ('the Frame Contract') between both parties for the construction of telecommunications towers and related works. The first defendant ('D1') was the subcontractor of D2 to perform works based on a Turnkey Services Frame Agreement ('Turnkey H
Agreement') whereas the plaintiff in turn became a joint-venture partner of D1 for works to be carried out under the Frame Contract and the Turnkey Agreement ('JV Agreement'). Among the conditions were: (i) that the plaintiff would pay D1 a sum of RM500,000 as a contract deposit which was to be treated as I
advance of part of D1's profit allocation from the project: (ii) that

A the project profit ratio was agreed at 85% for the plaintiff and 15% for D1; and (iii) that D1 will assign all the responsibilities and rights of the invoicing to the plaintiff whereby the plaintiff may deal and submit all claims directly to D2. The plaintiff accepted D2's instruction to proceed with execution of five to 16 sites of B the projects. However, difficulties arose with regards to approval of the works from the local authorities and eventually, the works stalled and the agreements between the respective parties were terminated. Thus, the plaintiff filed this suit and claimed from D1 the return of RM500,000 as well as damages and from D2, a sum C of at least RM1,321,413.50 for work done. It was the plaintiff's claim that D1 had committed fraud and was in breach of contract. In its submission, D1 contended, *inter alia*, (i) that the deposit was non-refundable and (ii) that the deposit was a consideration for awarding the project to the plaintiff. On the other hand, D2 D submitted, *inter alia*, (i) that there was a back to back arrangement between DIGI and D2 with regards to payments; (ii) that if DIGI did not pay D2, then the plaintiff was not entitled to payment; and (iii) that the plaintiff had breached the contract by failing to complete the works by 24 April 2006. The issues that arose for E consideration herein were; (i) whether there was a breach of contract by D1; (ii) whether D2 had failed to honour the assignment to the plaintiff of D1's invoicing and payment rights; and (iii) whether D2 was obliged under s. 71 of the Contracts Act 1950 ('the Act'), or on the basis of *quantum meruit*, to pay the F plaintiff all monies due in respect of the works rendered by the plaintiff.

Held (allowing plaintiff's claim with costs):

G **(1)** D1 had for all intent and purposes assigned the whole project to the plaintiff with the consent and approval of D2. From the agreement between the parties, where work was done, D2 would be at liberty to assess the invoices and then make payment as per what all three parties had agreed. Thus, there was no question that there was an assignment H in this case. (paras 11 & 12)

(2) No evidence was adduced to show that there had been no payment by DIGI. If D2 was relying on the back to back arrangement together with the fact of non-payment, the onus I was on them to introduce evidence to prove it. Further, it was also something which would have been within D2's

knowledge rather than the plaintiff who had no legal relationship with DIGI. It was therefore disingenuous to suggest that it was for the plaintiff to call someone from DIGI to prove the fact of payment. (para 15)

(3) D2 could easily have provided evidence of any non-payment by DIGI if they wanted to. As such, failure to call someone from DIGI was by design rather than any oversight. In all probability, DIGI would have paid D2 since the former was already using the towers built by the plaintiff. This contention of back to back arrangement and non-payment by DIGI was therefore wholly unpersuasive. (para 16)

(4) Whilst there may have been some urgency to complete the works, the timeline of 24 April 2006 was no longer cast in stone. The plaintiff was encouraged to think that they were given more time and that the contract would not be called off. They expected that once the timeline of 24 April had passed, they had to complete the works within a reasonable time. Considering the conduct and actions of the parties, it appeared that time had become at large and the failure to apply for extension of time to complete the works was not accordingly fatal (s. 47 of the Contracts Act 1950). Hence, given the circumstances, the plaintiff was entitled to judgment against D2. (paras 18 & 19)

(5) Although s. 71 of the Act appears in the Act, it is premised essentially on the doctrine of unjust enrichment. For s. 71 of the Act to be applicable, it must be shown that the doing of the act or the delivery of the thing: (i) must be lawful; (ii) must be done for another person; (iii) must not be intended to be done gratuitously; and (iv) must be such that the other person enjoys the benefit of the act or the delivery (*Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor*; refd). (para 21)

(6) A claim based on *quantum meruit* can be made for work done where the contract is terminated by breach. On the facts, the works were clearly lawful and were done by the plaintiff for the benefit of D2 after D2 had issued purchase orders for the same to be carried out. The plaintiff had not intended to execute the works for D2 gratuitously. There was no doubt from the evidence that D2 had enjoyed the

benefit of the work done as in all probability, they had been paid by DIGI as they are now using the towers built by the plaintiff. It would therefore be unjust for D2 to now refuse to make payment to the plaintiff for the work done. This fact of unjust enrichment is the essence of a claim under the *quantum meruit* as embodied in s. 71 of the Act. (para 22)

(7) Fraud is a serious allegation and must be proved beyond reasonable doubt. D1 depended on the plaintiff to complete the works before they could get their share of the profits. It was therefore in the interest of D1 to assist the plaintiff rather than to mislead them. The allegations of misrepresentations alone without proof of the element of dishonesty could not amount to fraud. On the other hand, there certainly was a breach of contract in that D1 failed to comply with certain obligations and undertakings under the JV Agreement. D1 failed, *inter alia*, (i) to obtain approvals from the relevant local authorities in respect of the sites for the project works; and (ii) to obtain the formal consent from DIGI to assign their invoicing and payment rights under the Frame Contract to the plaintiff within three months. This failure to comply with the obligations and undertakings was never challenged. (paras 23 & 24)

(8) Looking at the terms and conditions of the JV Agreement, it was agreed that the plaintiff shall be entitled to 85% and D1 15% of the net profit from each purchase order issued by D2 and/or DIGI. It was also understood from the said Agreement that the deposit of RM500,000 was to be treated as part of D1's portion of the net profit and to be deducted from D1's 15% entitlement accordingly. D1's argument that the deposit was non-refundable was therefore misconceived. (para 27)

(8a) Since the plaintiff was entitled to judgment against D2 for the sum of RM1,321,431.50, there would be some element of profit, for which D1 was entitled to 15% and which, to be fair, ought to be deducted from the deposit. The court assessed the plaintiff's profit to be in the region of 30% and D1's entitlement would therefore amount to RM60,000. They would therefore have to refund the sum of RM440,000 to the plaintiff. (para 28)

Case(s) referred to:
Buckland v. Farmer & Moody [1979] 1 WLR 221 ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***
Luck v. White [1973] 26 P & CR 89 ***(refd)***
Malayawata Steel Bhd v. Government of Malaysia & Anor [1980] 1 LNS 45 PC ***(refd)***
New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd, New Hebrides (In Liquidation) [1986] 1 LNS 30 SC ***(refd)***
Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 47, 71

For the plaintiff - JJ Chan; M/s Shearn Delamore & Co
For the 1st defendant - Zulkafli Abd Hamid; M/s Zulkafli, Rani & Co
For the 2nd defendant - HL Wong; M/s Azman Davidson & Co

Reported by Kumitha Abd Majid

JUDGMENT

Harmindar Singh Dhaliwal JC:

[1] The 2nd defendant, MCN Corporation Sdn Bhd ("D2"), was the main contractor to DIGI Telecommunications Sdn Bhd ("DIGI") by virtue of a Frame Contract dated 1 May 2005 between DIGI and D2 for the design, construction and implementation of GSM 1800 Version 3 Sites ("the Frame Contract"). This contract was essentially for the construction of telecommunications towers and related works.

[2] The 1st defendant ("D1") was the subcontractor of D2 to perform works based on a "Turnkey Services Frame Agreement" dated 13 January 2006 ("the Turnkey Agreement").

[3] The plaintiff in turn, by accepting a letter of offer on 3 February 2006, became a joint-venture partner of D1 for works to be carried out under the Frame Contract and the Turnkey Agreement ("JV Agreement"). Among the salient terms and conditions were:

(1) that the plaintiff will pay to D1 a sum of RM500,000 as a contract deposit which was to be treated as advance of part of D1's profit allocation from the project.

(2) that the project profit ratio was agreed at 85% for plaintiff and 15% for D1.

(3) that D1 will assign all the responsibilities and rights of the invoicing to the plaintiff whereby the plaintiff may deal and submit all claims directly to D2.

[4] In accordance with this arrangement, the sum of RM500,000 was duly paid by the plaintiff to D1. Then D2, by letter dated 4 February 2006, acknowledged and accepted in effect the proposed assignment of D1's invoicing and payment rights under the Frame Contract and the Turnkey Agreement to the plaintiff. The plaintiff had on or about 9 March 2006 accepted the instruction of D2 to proceed with execution of 5 of 16 sites of the projects.

[5] Soon after however, difficulties arose with regards to approval of the works from the local authorities as well as the presence of previous subcontractors of D2. Eventually, the works stalled and the agreement between D1 and D2 and the agreement between D1 and the plaintiff were terminated.

[6] The plaintiff, by this suit, now claims from D1 the refund of the said RM500,000 as well as damages and from D2, a sum of at least RM1,321,413.50 for work done.

Claim against D2

[7] For convenience, the claim against D2 is considered first. Counsel for the plaintiff and D2 appear to have expended much time and energy on the question of whether there was privity of contract between the plaintiff and D2. There was obviously no written agreement between the plaintiff and D2 to carry out any works. The real issue, in my view, is whether there was a valid assignment of rights. With that being the case and considering the matter in its entirety, the only claims by the plaintiff against D2 that merit consideration are twofold. The first claim or issue is whether D2 has failed to honour the assignment to the plaintiff of D1's invoicing and payment rights and the second is whether D2

was obliged under s. 71 of the Contracts Act 1950, or on the basis of *quantum meruit*, to pay to the plaintiff all monies due in respect of works rendered by the plaintiff.

Assignment

[8] It is "trite law that no particular form is required to constitute an equitable assignment, provided that it sufficiently clearly emerges from the documents (if they be writing) that it was the intention that in relation to the debt chose in action the alleged assignee was to stand in the shoes of the assignor as claimant against the debtor" (per Lord Russel in *Malayawata Steel Bhd v. Government of Malaysia & Anor* [1980] 1 LNS 45).

[9] The assignment of rights flowed from the letter of 4 February 2006 from D2 to D1. The letter reads as follows.

> Our Ref: MCN/PI/SE7C/L0501
>
> February 4, 2006
>
> MURAD HASHIM COMMUNICATION SDN BHD
> No. 44-1 Jalan 2/23A, Taman Danau Kota
> Off Jalan Genting Kelang
> 53300 Setapak Kuala Lumpur
>
> Dear Sir,
>
> RE: DIGI FRAME CONTRACT FOR DESIGN, CONSTRUCTION AND IMPLEMENTATION OF GSM 1800 SITES VERSION 3
>
> We are pleased to confirm that we are participating in a DIGI Frame Contract for Design, Construction and Implementation of GSM 1800 Sites Version 3 Contract. We confirm further that our DIGI contact code number is DG/PC/C/0116/04.
>
> We write to confirm, acknowledge and duly accepted your Joint Venture Proposal as our Sub-Contractor with KUMPULAN TEKNIK SDN BHD (Company No. 23804-K) of B-3-6.3rd Floor, Intan Business Centre 2, Lebuh Medan Ipoh, Bandar Baru Medan Ipoh 31400 Ipoh, Perak Darul Ridzuan and your proposal on the assignment of your right and obligation under the main Frame Contract and Sub-Contract with KTSB in respect of invoicing and payment claims.
>
> Should you have any further queries, please do not hesitate to contact the undersigned at 03-79543358/7665-1285.

A Thank you.

Sincerely,

John Gast
Engineering and Operations Director
B MCN CORPORATION SDN BHD

[10] Now, at the outset, it can hardly be disputed that by the letter of 4 February 2006 from D2 to D1, D2 had consented and agreed to the assignment of D1's right and obligation under the C main frame contract and the sub-contract between D1 and the plaintiff to the plaintiff in respect of invoicing and payment claims. This is further substantiated by the fact that D2, upon the execution of the JV Agreement on 1 March 2006, extended to the plaintiff purchase orders issued by D2 in respect of works to be D executed on 16 sites of the project works. It is also not surprising to note that D2's representative, John Gast, instructed the plaintiff to commence work on the first five sites. It was only after these events that the plaintiff commenced work.

[11] In a nutshell therefore, what was to take place was that the E plaintiff will carry out the works, submit the invoices and obtain payment directly from D2 and from which payment, D1 will be entitled to 15% of the profits received. With this arrangement in place, D1 had for all intent and purposes assigned the whole project to plaintiff with the consent and approval of D2.

F

[12] Now D2 does not dispute there was an assignment, indeed they cannot do so. They however suggest that it was a conditional assignment in that payment can only be made upon the fulfillment of certain conditions. I think this term "conditional" G is confusing if it is sought to suggest that because it was conditional, there was therefore no assignment. I think what is clear from the agreement between the parties in the instant case is that like any other situation where work is done, D2 would be at liberty to assess the invoices and then make payment as per H what all three parties had agreed. There was therefore no question that there was an assignment in this case.

The Claims

I **[13]** I now come to the plaintiff's claim of RM1,321,431.50 and note that it can be divided into four separated categories namely:

(1) A sum of RM25,000 being a claim for reimbursement by plaintiff to WHSB Trading Sdn Bhd;

(2) A sum of RM20,886 being a claim in respect of expenses incurred to procure the letter of approval in respect of five sites;

(3) A sum of RM1,014,403.88 in respect of work executed by the plaintiff in sites ID7411A, 7015A and 7017A;

(4) A sum of RM271,123.16 in respect of site ID7409A.

[14] D2 took issue with these invoices and claims on several grounds, all of which were without merit. I considered that the plaintiff had more than sufficiently proven that work was indeed done and that they were entitled to payment through both oral and contemporaneous documentary evidence. I noted that much of the evidence in this regard was unchallenged and in any event, D2 did not call a single witness to rebut these claims.

[15] I have also not overlooked the contention by D2 that there was a back to back arrangement between DIGI and D2 with regards to payments. The argument was that if DIGI did not pay D2, then the plaintiff was not entitled to payment. However, this argument suffered from a serious drawback in that no evidence whatsoever was adduced in court to show that there had been no payment by DIGI. If D2 was relying on the back to back arrangement together with the fact of non-payment, the onus was on them to introduce evidence to prove it. Furthermore, it was also something which would have been within D2's knowledge rather than the plaintiff who had no legal relationship with DIGI. It was therefore disingenuous for the plaintiff to now suggest that it was for the plaintiff to call someone from DIGI to prove the fact of payment.

[16] To the contrary, I think D2 could easily have provided evidence of any non-payment by DIGI if they wanted to. To a question by the court as to whether D2 would be calling anyone from DIGI, learned counsel for D2 replied no. So the failure to call someone from DIGI was by design rather than any oversight. I can only think that in all probability, DIGI would have paid D2 since DIGI was already using the towers built by the plaintiff. This contention of back to back arrangement and non-payment by DIGI was therefore wholly unpersuasive.

[17] There was a further argument put forward by D2 that the plaintiff had breached the contract by failing to complete the works by 24 April 2006. In this regard, it is firstly significant that D2, as revealed by the evidence, continued to deal with the plaintiff well after 24 April 2006. Secondly, the 24 April 2006 deadline was artificial and unrealistic for a number of reasons. There was evidence that D2 had underlying and unsettled issues with previous sub-contractors in respect of the work sites. They had not been paid and were occupying the project sites. This was conceded by D2 in their letter dated 13 September 2006 to D1. There was some correspondence from John Gast of D2 to D1 complaining of the delay. However, John Gast had passed away. The plaintiff's witnesses all gave evidence that John Gast had never pressed them on the deadline as he knew the issues and problems pertaining to the sites. Not much weight can therefore be attached to the said correspondence as it was disputed.

[18] From all the circumstances of the case, I considered that whilst there may have been some urgency to complete the works, the timeline of 24 April 2006 was no longer cast in stone. The plaintiff was encouraged to think that they were given more time and that the contract will not be called off. They had expected that once the timeline of 24 April had passed, they had to complete the works within a reasonable time. Considering the conduct and actions of the parties in the instant case, it appeared that time had become at large and the failure to apply for extension of time to complete the works, as contended by D2, was not accordingly fatal (see s. 47 of the Contracts Act 1950 and *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 where the Court of Appeal referred to *Luck v. White* [1973] 26 P & CR 89 and *Buckland v. Farmer & Moody* [1979] 1 WLR 221).

[19] Given the circumstances outlined in the foregoing, I would hold that the plaintiff is entitled to judgment against D2.

The Claim Under s. 71 Contracts Act 1950/Quantum Merit

[20] Section 71 of the Contracts Act 1950 provides as follows:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[21] Now it is generally agreed that although s. 71 appears in the Contracts Act 1950, it is premised essentially on the doctrine of unjust enrichment. For s. 71 to be applicable, it must be shown that the doing of the act or the delivery of the thing:

(a) must be lawful;

(b) must be done for another person;

(c) must not be intended to be done gratuitously; and

(d) must be such that the other person enjoys the benefit of the act or the delivery (see *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd, New Hebrides (In Liquidation)* [1986] 1 LNS 30).

[22] Despite suggestions by learned counsel for D2 that contractual claims are outside the province of s. 71 or *quantum meruit*, a claim based on *quantum meruit* can be made for work done where the contract is terminated by breach (see *Chitty on Contracts*, vol 1, 28th edn at 30-179). In the instant case, the works were clearly lawful and were done by the plaintiff for the benefit of D2 after D2 had issued purchase orders for the same to be carried out. The plaintiff had not intended to execute the works for D2 gratuitously. There is no doubt from the evidence that D2 has enjoyed the benefit of the work done as in all probability they had been paid by DIGI as they are now using the towers built by the plaintiff. It would therefore be unjust for D2 to now refuse to make payment to the plaintiff for work done. As alluded to earlier, this fact of unjust enrichment is the essence of a claim under *quantum meruit* as embodied in s. 71 of the Contracts Act 1950. The plaintiff is therefore entitled to judgment on this ground as well.

Claim Against D1

[23] The plaintiff is claiming that D1 had committed fraud and is in breach of contract. Now, it is clear that at the time of the contract, D1 had made certain representations with regard to the project works which turned out to be incorrect. Now if indeed there was fraud, plaintiff was at liberty to terminate the contract immediately and claim damages. This they did not do and instead proceeded to carry out the works. In my view, there cannot have

been any fraud as contended. Fraud is a serious allegation and must be proved beyond reasonable doubt. D1 depended on the plaintiff to complete the works before they could get their share of the profits. It was therefore in the interest of D1 to assist the plaintiff rather than to mislead them. The allegations of the misrepresentations alone without proof of the element of dishonesty cannot amount to fraud.

[24] Was there a breach of contract? There certainly was in that D1 had failed to comply with certain obligations and undertakings under the JV Agreement. D1 had failed to obtain approvals from the relevant local authorities in respect of the sites for the project works and in particular the sixteen sites as authorised under the purchase orders issued by D2. D1 had also failed to make good on their undertaking to procure additional purchase orders of at least RM5,000,000 in value within one month from the date of the JV Agreement. D1 had also failed to obtain the formal consent from DIGI to assign their invoicing and payment rights under the frame Contract to the plaintiff within three months. This failure to comply with the obligations and undertakings was never challenged.

[25] Curiously, D1, through the evidence of SD1, sought to persuade the court that it was the plaintiff who breached the agreement. However, this sudden and unexpected endeavor was untenable for it was never pleaded, never put to the plaintiff's witnesses and unsubstantiated by documentary evidence. In fact, what SD1 stated in his testimony was against the weight of the documentary evidence. I therefore considered his evidence to be unreliable. It was therefore D1 who were clearly in breach of the JV Agreement.

[26] Despite the breach, the plaintiff did not terminate the agreement and proceeded along with it until they probably realized that payment was not going to be forthcoming. Now because they have not been paid, the plaintiff is seeking a refund of the RM500,000 deposit as they claim that no profit had been made on account of non-payment. D1, on the other hand, contends that this deposit is non-refundable and that it was consideration for awarding the project to the plaintiff. So who is right?

[27] Looking at the terms and conditions of the JV Agreement between them, in particular cl. 10.1, it was agreed that the plaintiff shall be entitled to 85% and D1 15% of the net profit from each purchase order issued by D2 and/or DIGI. By cl. 10.2, it was also understood and agreed that the deposit of RM500,000 was to be treated as part of D1's portion of the net profit and to be deducted from D1's 15% entitlement accordingly. D1's argument that the deposit was non-refundable is therefore misconceived.

[28] Is the plaintiff entitled to a full refund? I think yes but only if they had not succeeded in their claim against D2. Since the plaintiff is entitled to judgment against D2 for the sum of RM1,321,431.50, there would be some element of profit, for which D1 is entitled to 15% and which, to be fair, ought to be deducted from the deposit. Doing the best I can with the evidence before me, I would assess the profit of plaintiff to be in the region of 30%. D1's entitlement would therefore amount to RM60,000. They would therefore have to refund the sum of RM440,000 to the plaintiff.

Conclusion

[29] In the circumstances, and for the reasons I have stated, there will be judgment for the plaintiff against D1 for the sum of RM440,000 together with interest and costs. There will also be judgment for the plaintiff against D2 for the sum of RM1,321,431.50 together with interest and costs. Interest shall be at the rate of 4% from date of the writ until payment. Costs are assessed after hearing the parties at RM30,000 to be paid by D1 to plaintiff and RM30,000 to be paid by D2 to plaintiff.